STATE OF MICHIGAN
IN THE SUPREME COURT

ELLEN M. OSTROTH and
THANE OSTROTH

Plaintiffs,

-and-

JENNIFER L. HUDOCK and
BRIAN D. HUDOCK,

Plaintiffs-Appellees,

V

WARREN REGENCY, G.P., L.L.C.
and WARREN REGENCY LIMITED
PARTNERSHIP,

Defendants,

-and-

EDWARD SCHLAK, HOBBS &
BLACK, INC.,

Defendant-Appellant

Supreme Court
Docket No. 126859

Court of Appeals
Docket No. 245934

Macomb County Civil
Action No. 00-1912-CE

ECORSE BOARD OF EDUCATION'S AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES JENNIFER AND BRIAN HUDOCK

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Statement Identifying Order Appealed From

Amicus Curiae Ecorse Board of Education supports Plaintiffs-Appellees Jennifer and Brian Hudock in their effort to affirm the July 8, 2004 decision of the Court of Appeals in *Ostroth v Warren Regency, G.P., L.L.C.,* 263 Mich App 1; 687 NW2d 309 (2004).

Statement Identifying Relief Sought

The Court of Appeals correctly applied the plain language of MCL 600.5805 and MCL 600.5839 when concluding that all actions against an architect, engineer, or contractor arising from an improvement to real property must be filed within six years of the occupation or completion of the improvement project. This court in *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980) stated that section 5839 was both "one of limitation and one of repose." *Id.* at 15. The decision in *Witherspoon v Guilford,* 203 Mich App 240; 511 NW2d 720 (1994) was wrongly decided and made distinctions within the application of sections 5805 and 5839 that the legislature intended to be removed. The proper statute of limitation for any action against an architect, engineer, or contractor arising from an improvement to real property is six years.

Statement of the Issues

Does MCL 600.5839(1) preclude application of the limitation periods prescribed by MCL 600.5805(6) and MCL 600.5805(10)?

Plaintiffs-Appellees answer: Yes
Defendant-Appellant answers: No
Amicus Curiae Ecorse Board of Education answers: Yes

If MCL 600.5805 applies, does the two-year period of limitations found in subsection (6) apply to the claim asserted against Defendant architecture firm Edward Schulak, Hobbs & Black?

Plaintiffs-Appellees answer: No
Defendant-Appellant answers: Yes
Amicus Curiae Ecorse Board of Education answers: No

Statement of facts and Interest of Amicus Curiae Ecorse Board of Education

Amicus Curiae Ecorse Board of Education is an elected board charged with operating a Michigan School District. Michigan Schools seek to advance the educational opportunities and options available for their students and often update facilities through the support of public funds. Michigan Schools and the general public are adversely affected by faulty design and construction occurring on campuses throughout the state. Often, these defects in design and/or construction do not materialize or become known to the school system until more than two years have passed.

On July 8, 2004, the Michigan Court of Appeals correctly interpreted the plain meaning of statutory language clarifying the amount of time any party (first or third) has to bring suit against an architect, engineer or contractor for professional negligence once an improvement to real property is made. This is of great importance to the taxpaying public and Michigan School Districts charged with maintaining and improving existing facilities. In *Ostroth v Warren Regency, G.P., L.L.C.,* 263 Mich App 1; 687 NW2d 309 (2004), The Michigan Court of Appeals held that the two-year period prescribed by MCL 600.5805(6) defers by direct implication to the more exact language found in MCL 600.5805(14). This period of limitation is stated, once again by direct reference, within MCL 600.5839(1). The period of limitation, according to section 5839, is six years. Claims by the construction industry that the decision in *Witherspoon v Guilford,* 203 Mich App 240; 511 NW2d 720 (1994) is binding and logically sound do not address how contradictory and misguided the decision is. The Industry also fails to address the fact that the cases cited in *Witherspoon* are the same cases correctly interpreted by the Court of Appeals in its decision pertaining to this matter.

By mandate of the legislature, and the plain meaning of the language in sections 5805 and 5839, the ruling in *Witherspoon* should no longer shield architects, engineers and contractors with an impracticable two-year period of limitation beginning from the time the owner takes possession of an improved property. Under *Witherspoon* the entire six-year repose period would never be available to the injured party.

Also, contrary to the Industry's contentions, *Ostroth* did not rule that MCL 600.5805 is inapplicable to claims against the building professionals at issue. In fact, MCL 600.5805(14) was specifically written to supply these types of claims a more specific limitation period than the general limitation periods in MCL 600.5805(6) and (10). In addition, the Industry proponents of the two-year period of limitations lobbied for the addition of MCL 600.5805(14) to prevent claims from accruing after six years.

It is critical that this Court decisively settle the rift created by the *Ostroth* and *Witherspoon* decisions. The plain meaning of the statutes involved and the actual testimony from Industry representatives regarding the passage of MCL 600.5805(14) can only lead to the conclusion that all claims of the type in the case at bar may be brought within six years of the date of occupancy.

Standard of Review

A question of statutory interpretation is subject to *de novo* review, as are issues involving the grant or denial of a motion for summary disposition. *Kreiner v Fischer,* 471 Mich 109, 129; 683 NW2d 611 (2004).

Argument

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE PLAIN LANGUAGE OF MCL 600.5839(1) SETS FORTH THE STATUTE OF LIMITATIONS FOR ANY ACTION AGAINST AN ARCHITECT, ENGINEER OR CONTRACTOR ARISING FROM IMPROVEMENTS TO REAL PROPERTY.

A. This Court and the Court of Appeals Have Consistently Stated Since 1978 That MCL 600.5839 is a Statute of Limitation and Repose.

The proponents of a two-year malpractice period of limitation for architects, engineers and contractors continue to refer to MCL 600.5839 as a "period of repose" only. This is simply not the case. First recognized as both a statute of limitation and repose by the Court of Appeals in *Oole v Oosting*, 82 Mich App 291; 266 NW2d 795 (1978), this interpretation was adopted by this Court in *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980). In fact, the opponents of this position fail to disclose that their strongest case, *Witherspoon v Guilford,* 203 Mich App 240; 511 NW2d 720 (1994), also stated that "the effect of [section 5839] was one of both limitation and repose." *Witherspoon, supra* at 245, citing *O'Brien, supra* at 15. In addition, this same proposition has been cited in *Michigan Millers Mut Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367; 494 NW2d 1 (1992), a case cited to often by the *Witherspoon* decision, but differing in outcome. No other authority has expressly contradicted the interpretation of this Court to present date.

B. The Legislature's Intent as Demonstrated by the Plain Language of MCL 600.5805 and MCL 600.5839 was To Create a Standard Period of Limitation for Architects Engineers and Contractors Based on the Completion of a Project and Not the Discovery of a Defect.

As will be illustrated below, all actions against state licensed architects, no matter what the title, whether out of tort, contract, or malpractice, are governed by the specific, six-year statute of limitations contained in MCL 600.5839, which provides in pertinent part:

> (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death arising out of the defective and unsafe condition of an improvement to real property ... against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use or acceptance of the improvement . . ..

In 1988, the Michigan State Legislature amended MCL 600.5805 to add subsection (10) (now subsection (14)). That section provides that "**[t]he period of limitations** for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property **shall be as provided in section 5839"** (emphasis added). It was added so that the general period of limitations referenced in Defendant's brief would no longer apply. This specific period of limitation is alluded to by the general period of limitation for malpractice because of the way it is prefaced:

> (6) **Except as otherwise provided in this chapter**, the period of limitations is 2 years for an action charging malpractice.

MCL 600.5805(6) (Emphasis added.)

It seems clear that the legislature left the opportunity for a different subsection within section 5805 to be applied for more specific limitation purposes. Subsection (14) is the specific period of limitation that usurps the general rule. This Court has consistently held that specific periods

of limitation control over general ones. *Hawkins v Regional Medical Laboratories, PC*, 111 Mich App 651, 655; 314 NW2d 450 (1979), *aff'd* 415 Mich 420 (1982).

Historically, Defendant may have had a legal basis to make its allegations, but it no longer has that legal pedigree in light of the most recent actions by the legislature and the courts. Before the amendment to section 5805, the Court of Appeals in three separate decisions had declined to apply section 5839 to an owner's action against an architect or engineer arising out of a defect in the improvement itself. Instead, the courts had determined that an owner's action would be governed by the general statute of limitations applicable to the particular claims. *See, e.g. Midland v Helger Const Co*, 157 Mich App 736, 745; 398 NW2d 481 (1987); *Burrows v Bidigare/Bublys, Inc*, 158 Mich App 175, 182; 404 NW2d 650 (1987); and *Marysville v Pate, Hirn & Bogue, Inc*, 154 Mich App 655; 397 NW2d 859 (1986). These cases limited the application of section 5839 to third party claims for injury or property damage. In response to these cases, the legislature, which clearly intended section 5839 to apply to all actions and to be a statute of limitations and repose, took up an amendment to section 5805, which clearly stated that all actions of the type in this case are to be governed by section 5839. MCL 600.5805(10) (now subsection (14)). The analysis of the bill that amended section 5805 stated that it was meant to overturn the three decisions cited above, and make it clear that section 5839 controls claims of the instant type.

This plain language of the statute is fully supported by and is consistent with other more recent Court of Appeals' decisions applying § 5839 to owner's actions against architects and contractors and refusing to apply the general negligence or malpractice limitations period. *See, Travers Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335; 586 NW2d

847 (1997) and *Michigan Millers, supra*. Each of these cases further the proposition delineated in the 1988 legislative change.

In *Michigan Millers*, the court addressed the effect of § 5805(14) on section 5839 and held that the amendment reflected the Legislature's intent to apply the limitations periods contained in § 5839(1) to all actions against contractors and state licensed architects and engineers, regardless of whether the plaintiff was a third party or had privity with the defendant. The *Michigan Millers* Court's discussion of the Legislature's intent in enacting section 5805(10) (now subsection (14)) and its effect on section 5839 is pivotal to the analysis of which statute of limitations is applicable in this case.

Central to *Michigan Millers*, the plaintiffs argued that 5839(1) did not govern their claims because they were building owners claiming damages for defects in the improvement itself and not third parties whose injuries "arose out of" the defective improvement. Instead, the plaintiffs asserted that the three-year period of limitation in § 5805(8) applied to their claims. The plaintiffs relied on *Midland, Burrows, and Marysville*, cited above, which held that MCL 600.5839(1) only applied to third-party actions. *Michigan Millers,* at 371. In determining that the addition of § 5805(10) (now subsection (14)) was meant to overrule the judicially created exception used in these cases, the Court looked to the legislative history surrounding the amendment, which specifically mentioned *Burrows*.

> The bill would ensure that, in future claims against engineers, architects, and contractors, the interpretation of the dissenting judge in the *Burrows* case would prevail. Architects, engineers, and contractors should be protected from suits charging malpractice or negligence in building improvements after a significant time has passed since the actual performance of the work. It is unfair for these professionals to be vulnerable to lawsuits years after a project has been completed, and State law already offers protection against such vulnerability for

> injuries "arising out of the defect or unsafe condition of an improvement to real property." Reportedly, the Legislature meant that protection to include all suits brought against architects, engineers, and contractors for defects or unsafe conditions in an improvement to real property. The bill would ensure that such protection was extended to include suits claiming damages for defects in the improvement itself as well as those for damages "arising out of the defect."

Michigan Millers, at 376, quoting Senate Fiscal Agency Analysis, SB 478, October 21, 1987, and Senate Fiscal Agency Analysis, SB 478, June 22, 1988.

Burrows involved a claim of professional malpractice or negligence against certain individual architects. In his dissenting opinion, Judge Burns, a former legislator, asserted that the applicable period of limitations was the special six-years-from-occupancy provision in section 5839. *Burrows, supra* at 191. Citing the Supreme Court's decision in *O'Brien*, as support for his position, Judge Burns contended, "This statute of limitation is specifically applicable to architects and, thus, controls over the more general malpractice or negligence statutes of limitation." *Id.* Judge Burns concluded that the plaintiffs' action was timely filed because it was brought within six years after occupancy, acceptance, or use of the improvement. *Id.*

In *Travers Lakes*, the Court of Appeals held that the trial court erred in applying the general three-year statute of limitations for ordinary negligence claims to the plaintiff's negligence claim against the contractor, defendants Douglas and Burlington. In that case, the plaintiff's claim accrued at the latest by September 1988 and the complaint was filed in September 1993. *Id* at 339-340. Because the plaintiff filed its complaint within six years from the occupancy, use, or acceptance of the completed construction project, the court concluded that the plaintiff's claim should not have been dismissed on the basis that the period of limitations had run. *Id* at 342-343.

Finally, and most recently in this case, in response to defendant's statute of limitations defense, plaintiff argued that the applicable period of limitation for this case was six years, as prescribed in MCL 600.5839(1). Defendant argued that § 5805(4) (now (6)), pertaining to professional malpractice, provided the applicable period of limitations. The trial court agreed and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis that plaintiffs had not filed their complaint within the two-year limitations period. In reversing the trial court the Court of Appeals employed an in depth analysis, including the holdings in *Michigan Millers* and *Travers Lakes* to conclude: "We hold that the special six-year statute of limitations in 5839(1) applies to all negligence actions against architects, contractors, and engineers." *Ostroth, supra* at 17. The court also specifically found that the trial court erred when it applied the two-year statute of limitations set forth in section 5805(4) (now (6)). *Id.*

Witherspoon is an aberration based on faulty reasoning. The opinion recognizes that section 5839 is both a period of limitation and repose, but it somehow preserves a general period of limitation to effectively contradict its prior recognition of 5839. The decision ignores the plain meaning of the statutory language. This Court has recently reasserted the position that most statutory language is unambiguous and must be enforced as written. *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 281; 696 NW2d 646 (2005). Even though the dual nature of section 5839 acting as a statute of limitation and repose from the time a property is occupied may seem odd, it is what the legislature drafted.

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: The responsibility for drawing lines in a society as complex as ours--of identifying priorities, weighing the relevant considerations and choosing between competing

alternatives--is the Legislature's, not the judiciary's. *Henry v Dow Chem Co*, 2005 Mich LEXIS 1131 (2005) *Citing, Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1990).

C. The Legislative History of MCL 600.5805(14) Indicates That This Amendment was Lobbied For by the Construction Industry and Designed to Clarify that the Six-Year Period of Limitation Would Apply to All Claims.

Denying that the legislature intended to supply a uniform six-year period of limitation and repose for the type of claim before the Court becomes even more difficult when the Michigan Archives available for this matter are examined. Many of the parties with interest in this matter hired lobbyists to support MCL 600.5805(10) now (14), back in 1987 when it was introduced. Furthermore, Courts may look to the legislative history of a statute to ascertain its meaning. *See, e.g. People v Hall*, 391 Mich 175; 215 NW2d 166 (1974) and *Luttrell v Dept of Corrections*, 421 Mich 93; 365 NW2d 74 (1984).

Counsel for Appellees has previously provided the Court with State of Michigan Archives documents and recordings for its review. Ecorse will not duplicate those here. The minutes from the Michigan Senate Judiciary Committee hearing memorializing the debate over what would become Senate Bill 478 of 1988 contain the construction industry's understanding of what MCL 600.5805(10) would serve to accomplish. Dennis Cawthorne, a well-known lobbyist and attorney currently practicing in Lansing, represented the State Society of Architects/Engineers at the October 15, 1987 hearing. From the meeting minutes and the recording of the hearing, it is clear that the architects and engineers ". . . supported the bill and explained the purpose of this bill is to clarify the statutes of limitations, which is six years." Mike Crawford, of the Construction Association of Michigan also, ". . . supported SB 478 and indicated the bill does not change policy, it clarifies it." Based on this testimony alone, the bill was voted out of committee unanimously.

The House of Representatives Judiciary Committee also reported on SB 478 favorably and unanimously on March 15, 1988. It was urged to do so, once again, by the State Society of Architects/Engineers through the representation of Dennis Cawthorne. Attorney Cawthorne drafted a letter on firm letterhead urging the House to act as the Senate had and pass SB 478. In his letter, Mr. Cawthorne indicates the understanding that the amendment is to clarify the original intent of section 5839 that all suits against architects, engineers and contractors are subject to the time limits in that statute. This amendment was necessary due to Appeals Court decisions that had "muddied the waters"

Judging by the ruling in *Michigan Millers, supra* in 1992 and the language of the statutes at issue, it seemed as though the six-year period of limitation was established and understood. The Michigan legal community was made more aware of the effects of section 5805(10) (now (14)), through academic means as well. Published in the October 1992 Michigan Bar Journal, Cynthia M. Martinovich authored an article titled: *Two, Three, Now It's Six, Architects and Engineers are in a Fix.* This article discusses the exact same issue, as is now, some thirteen years later, being addressed by this Court. So sure of the application of section 5839 as the correct period of limitation, that Ms. Martinovich wrote the following:

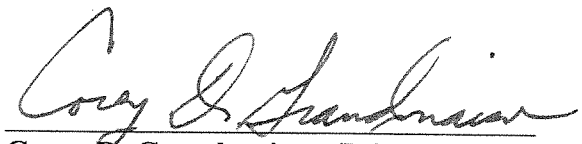
> Application of Section 5839 became compulsory following a recent amendment to the Revised Judicature Act. The amendment, Section 5805(10), reads, 'the period of limitations for an action against a state licensed architect, professional engineer or contractor based on an improvement to real property shall be as provided in Section 5839.' Accordingly, Section 5805(10) incorporates Section 5839, a pre-existing minimum six-year limitations period . . ..
>
> * * *
>
> Although there is no case law interpreting Sections 5805(10) and 5839(1), it is now indisputable that the correct limitations period for a tort claim against an engineer or architect is at least six years . . .. 72 Mich B J 1038 (1992).

So what happened to once again muddy the waters on this issue? The decision in *Witherspoon* in 1994 happened. What seemed so clear between 1988 and at least October of 1992 was turned completely on its head by the incorrectly decided ruling in *Witherspoon.* The Court of Appeals decision in this case simply returned the function of the statutory language to what was sought for by the construction industry back in 1988. Opportunistic parsing of the statutes at issue caused the need to pass SB 478 in 1988, created an unfair and contradictory standard in *Witherspoon* in 1994, and necessitates overdue clarification from this Court in 2005.

Conclusion and Relief Requested

Amicus Curiae Ecorse Board of Education requests that this honorable Court affirm the decision of the Court of Appeals and return clarity to the application of sections 5839 and 5805 as it relates to work performed by architects, engineers and contractors.

Respectfully Submitted,



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